IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TYCO INTERNATIONAL LTD. and TYCO INTERNATIONAL (US) INC., Plaintiffs, v. L. DENNIS KOZLOWSKI, Defendant.	Case No. 02-cv-7317 (TPG)

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT/COUNTERCLAIM PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant and Counterclaim Plaintiff L. Dennis Kozlowski is a convicted felon serving 8 1/3 to 25 years in a New York State prison. He was convicted of stealing from and defrauding his former employer, Tyco. Kozlowski's disloyal conduct disqualifies him from receiving any compensation and precludes Tyco from indemnifying him. Accordingly, Kozlowski's motion should be denied.

Years before Tyco uncovered Kozlowski's thievery, and while Kozlowski was Chairman and Chief Executive Officer of Tyco, Kozlowski and Tyco entered into an Executive Retirement Agreement (the "ERA") in order to assure Kozlowski's "continued services and loyalty." As his convictions for crimes against Tyco conclusively establish, Kozlowski was not a loyal employee but rather was engaged in disloyal conduct constituting a dishonest breach of his fiduciary duties to Tyco. Under equitable principles applicable in New York, Bermuda, and England, such conduct forfeits Kozlowski's right to any compensation from Tyco.

Kozlowski spends a great deal of time arguing that Bermuda law governs his entitlement to compensation under the ERA, and that because Bermuda law supposedly "has no equivalent" to a doctrine of forfeiture of compensation paid to disloyal fiduciaries, Bermuda courts would award him any and all compensation he seeks despite his disloyal service. Memorandum of Law of Defendant/Counterclaim Plaintiff L. Dennis Kozlowski in Support of His Motion for Partial Summary Judgment ("Def. Mem.") at 26. He goes so far as to say that his criminal conduct against Tyco is "irrelevant as a matter of law." Def. Mem. at 22. Kozlowski's assertions about Bermudian and English law are patently wrong. Regardless of which jurisdiction's law applies, Kozlowski cannot recover under the ERA.

Bermuda courts have acknowledged that a dishonest fiduciary may be barred from recovering any compensation. Kozlowski's scheme of fraud and looting more than meets the threshold for forfeiture as a matter of Bermuda law. Moreover, the law of England, to which Bermuda courts may look for guidance, long has held where there is a breach of fiduciary duty, "commission is forfeit." *Imageview Management Ltd. v. Jack*, [2009] EXCA Civ 63, at ¶ 51. Thus, Bermuda and English common law, like New York's faithless servant doctrine, compel Kozlowski to forfeit any benefits under the ERA.

Kozlowski also claims that he has not forfeited his compensation because his disloyalty − resulting in his convictions for stealing, falsifying records in order to conceal his thefts, conspiracy and securities fraud − did not "infect[] the 'most material and substantial part'" of his service to Tyco as CEO. Def. Mem. at 3. Moreover, he says, because "Tyco was no Enron" and the company grew while he was CEO, Kozlowski's crimes should be overlooked. *Id*. at 5. These arguments are unsustainable under Bermuda and New York law, both of which bar a disloyal fiduciary from receiving any compensation even when that fiduciary's service benefitted the principal.

In addition, Tyco may rescind the ERA, which was procured by Kozlowski's fraud. While Kozlowski portrays the ERA as a "simple, unambiguous contract that guaranteed" him payment regardless of his criminal acts, he fails to mention that before he and members of Tyco's Compensation Committee negotiated and executed the contract, he had been defrauding the company and breaching his fiduciary duties to Tyco for years, while actively concealing those breaches from the company.[1] Whether in Bermuda or New York, a party may unilaterally rescind a contract induced by fraud or dishonesty.

Kozlowski also asks that Tyco be ordered to indemnify him for the costs he has incurred in defending the TyCom securities fraud litigation. He claims that his looting of Tyco is not at issue in that litigation. Because of his convictions for crimes involving fraud and dishonesty, Bermuda law prohibits Tyco from indemnifying Kozlowski in connection with any case. Moreover, to the TyCom Plaintiffs, Kozlowski's motivation for conducting the TyCom IPO − which they claim was merely a device to enhance and continue his fraudulent scheme at Tyco − remains an issue in that case. For the same reason he has forfeited his compensation back to 1995, Kozlowski is not now, nor will he ever be, entitled to indemnification.

Because binding authority bars Kozlowski from receiving compensation under the ERA, or any other agreement, and prohibits Tyco from indemnifying him in any case, Kozlowski's motion should be denied.

ARGUMENT

I. Kozlowski Was a Faithless Fiduciary and Is Not Entitled to Compensation Under New York or Bermuda Law.

From prison, Kozlowski maintains that Tyco has no basis for refusing to pay him millions of dollars in retirement benefits. Def. Mem. at 21-29. He claims that his New York state convictions are "irrelevant as a matter of law" and ignores that applying the law of Bermuda results in the same forfeiture of compensation as applying New York law.[2] *Id*. at 22.

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[1] *See* Tyco's Statement of Undisputed Facts in Support of its Motion for Summary Judgment, [Dkt. No. 44] ("Tyco SUF") (incorporated by reference herein), at ¶ 154, *see also id*. at ¶¶ 44-50, 64, 66-87, 93-105, 107-110, 121-126 (regarding concealment).

[2] For the reasons stated in Tyco's Memorandum in Support of its Motion for Partial Summary Judgment, New York law governs this dispute. Memorandum of Law in Support of Tyco's Motion for Partial Summary Judgment on Liability and Counterclaims, March 5, 2010 [Dkt. 40]

Kozlowski also claims that his persistent looting and fraudulent concealment over a course of years falls short of the faithless servant doctrine's "high standard." Def. Mem. at 27. Divorcing his arguments from reality, he claims his disloyal activities were not related to the performance of his job. *Id*. at 27-28. Kozlowski also asserts that because he was charged with the overall stewardship of the company − and not merely assigned "certain narrowly defined management tasks" − disgorging compensation paid him during the period of his proven disloyalty is particularly unfair. *Id*. at 28-29. Finally, because he was "at the helm" during a period of robust growth for the company, Kozlowski claims that "whatever his faults" he should not be stripped of his compensation. *Id*. at 28-29. Kozlowski's incredible assertions defy the laws of New York and Bermuda – and common decency. In either jurisdiction, Kozlowski's criminal acts proscribe any entitlement he might have had to compensation from Tyco.

A. Under New York Law, Kozlowski Forfeited his Compensation During his Period of Disloyalty.

Under New York's faithless servant doctrine, an employer may refuse to pay an employee "who is faithless in the performance of his services," and such employee is not entitled to recover wages for the period for which he was disloyal. *Feiger v. Iral Jewelry, Ltd.*, 363 N.E.2d 350, 351 (N.Y. 1977); *see also Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 199-02 (2d Cir. 2003) (under New York law, an employee has a duty of loyalty to his employer, and any substantial breach of that duty renders him ineligible to recover his

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("Tyco Br.") at 9-10 (in New York, the law of the jurisdiction where the tort occurred generally will apply). However, even Bermuda law − which is said to govern the ERA − applies the substantive law of the place where the tortious conduct occurred. Affidavit of Kiernan J. Bell, April 13, 2010 ("Bell Aff.") ¶ 38. Even if this Court disagrees, and applies the substantive law of Bermuda, Kozlowski's Motion for Partial Summary Judgment still should be denied. Bermuda law is essentially the same as New York law on the relevant issues. As will be demonstrated below, this is not a "choice of law" case. This Court can apply New York or Bermudian law and the result will be the same. Under both jurisdictions' laws, Kozlowski's motion fails.

contractual compensation). Also, under the doctrine, when an employee is substantially disloyal in one of his tasks, he is prevented from recovering compensation for any of his tasks performed for that employer. *See Phansalkar*, 344 F.3d at 203-07.

New York courts have found breaches to be "insubstantial" only where they constituted single, isolated incidents, or where those breaches were performed with the knowledge and acceptance of the employer. *Feiger*, 363 N.E.2d 351; *Phansalkar*, 344 F.3d at 201-02. Certainly, Kozlowski's many years of looting and defrauding his employer of hundreds of millions of dollars resulting in multiple felony convictions cannot be deemed an "insubstantial" breach of fiduciary duty. And, the criminal convictions prevent an argument that Tyco accepted the breaches. *See* Tyco Br. at 9, 30-31; *see also People v. Kozlowski*, 846 N.Y.S.2d 44, 46-47 (N.Y. App. Div. 2007), *aff'd* 898 N.E.2d 891 (N.Y. 2008), *cert. denied* 129 S. Ct. 2775 (2009).

Moreover, Kozlowski's principal argument against applying the faithless servant doctrine here − that because Tyco was "dramatically successful" in spite of his disloyalty the faithless servant doctrine does not apply to him, Def. Mem. at 27-28 – was specifically rejected by the Second Circuit Court of Appeals. As stated in *Phansalkar*: "It does not make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent." *Phansalkar*, 344 F.3d. at 200 (quoting *Feiger*, 363 N.E.2d at 351).

Likewise, this Court has held, based on similar − though less egregious − facts, that a former chief executive who engaged in criminal conduct against his employer had forfeited salary and benefits that accrued during his period of disloyalty, despite credible trial testimony that his employer's "rise to prominence as the nation's leading charitable organization was directly attributable to his efforts." *Aramony v. United Way of America*, 28 F. Supp. 2d 147, 176

(S.D.N.Y. 1998), aff'd 191 F.3d 140 (2d Cir. 1999); *see also Colliton v. Cravath, Swaine & Moore, LLP*, 2008 U.S. Dist. LEXIS 74388, at *14, *17 (S.D.N.Y. Sept. 24, 2008) (applying faithless servant doctrine despite former employee's arguments that employer suffered no damage from his misconduct; "[i]t does not make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent") (quoting *Phansalkar*, 344 F.3d at 200).[3]

Because Kozlowski's criminal conduct caused his employer to incur hundreds of millions of dollars in damages,[4] there can be no dispute that Kozlowski's misconduct − resulting in 22 felony convictions − constituted a substantial breach of his duty of loyalty and his fiduciary duties to Tyco which entitles Tyco to disgorge all compensation paid or accrued during the period of Kozlowski's disloyalty. *See* Tyco SUF ¶¶ 19; *Feiger*, 363 N.E.2d at 351; *Phansalkar*, 344 F.3d at 201-02.

B. Kozlowski's Cited Authority Supports Tyco's Position That, Under New York law, His Right to Compensation is Forfeited.

Kozlowski's reliance on *Sanders v. Madison Square Garden, L.P.*, 2007 U.S. Dist. LEXIS 48126, at *10-20 (S.D.N.Y. July 2, 2007), is misplaced. In that case, this Court rejected applying the faithless servant doctrine to an employee who owed her employer no fiduciary duty, and who engaged in unethical behavior unrelated to her job. Without a fiduciary duty, no legal basis exists for applying the faithless servant doctrine, and the doctrine is not intended to reach employees who engage in "private misconduct." *Sanders*, 2007 U.S. Dist. LEXIS 48126, at *13. However, this Court stated the doctrine *would* apply to an employee who "withheld" from the employer "cash, stocks, and other interests that belonged to" the employer, quoting *Phansalkar*, 344 F.3d at 203, and to an employee who "surreptitiously organized a competing corporation, corrupted a fellow employee, and secretly pursued and profited from one or more opportunities properly belonging to his employer," quoting *Maritime Fish Prods., Inc. v. World-Wide Fish Products. Inc.*, 100 A.D.2d 81 (N.Y. 1984). Here, the same analysis would result in applying the doctrine to Kozlowski. 2007 U.S. Dist. LEXIS 48126, at *10-20.

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[3] As discussed *infra*, the law of Bermuda and England is the same.

[4] Incredibly, Kozlowski claims that his debt to Tyco has been paid. He claims to have repaid all the money that was "purportedly stolen." Def. Mem. at 2. Yet, the transcript of the criminal court's sentencing hearing contradicts these assertions. While the court indeed ordered Kozlowski to pay nearly $98 million to Tyco, plus a $70 million fine, it specifically stated the restitution amount covered only a part of what Kozlowski was convicted of stealing from Tyco. Tyco SUF ¶¶ 21-24 (excluding, among other things, millions of dollars Kozlowski stole from Tyco to purchase artwork for his personal use, and amounts Kozlowski wrongfully caused to be paid to other Tyco employees); *see also* Tyco SUF ¶¶103-104 (the money he diverted to select individuals by way of relocation loans, alone, totaled tens of millions of dollars). In fact, the Multidistrict Litigation Court entered a preliminary injunction in 2008 prohibiting Kozlowski from dissipating his assets in advance of judgment in this case. Tyco SUF ¶¶ 28-31. Kozlowski even admits that an outstanding balance remains on his Key Employee Loan. Tyco SUF ¶ 59. That balance exceeds $25 million. Tyco SUF ¶58.

In *Sanders*, this Court also explained the purpose of the faithless servant doctrine. Unlike in a traditional breach of fiduciary duty claim, the doctrine permits an employer to recover compensation from a disloyal employee without having to prove that it "suffered … provable damage as a result of the breach of fidelity by the agent." *Sanders*, 2007 U.S. Dist. LEXIS 48126, at *10-11 (citations omitted). That is, the faithless servant doctrine provides a remedy for an employer if an employee breaches that duty and "it is difficult to prove that harm resulted from the breach or . . . the [employee] realizes no profit from the breach." *Id.* at *18 (quoting Restatement (Third) of Agency § 8.01 (2006)). The doctrine's standards, then, are lower, not higher, than a traditional breach of fiduciary duty analysis. Kozlowski's criminal scheme which drained hundreds of millions of dollars from Tyco, of course, more than meets the standards of the faithless servant doctrine.[5]

Finally, Kozlowski relies on a "pure breach of contract" case in which no independent duty of care, let alone a fiduciary duty, existed between the parties, for the remarkable proposition that denying Kozlowski's benefits claim would result in a "totally unjustified windfall" for Tyco. Def. Mem. at 28 (citing *Seven Hanover Assocs.*, 2008 WL 464337, at *5, 6) (dismissing all non-contract claims because no independent duty existed). This argument should be ignored.

Kozlowski has failed to identify any remotely similar case − or any case at all − supporting his view that his disloyalty does not meet the "high standard" of the faithless servant doctrine. In fact, his cases show that, under the faithless servant doctrine, compensation is forfeited even when a disloyal employee's conduct does not harm the employer and even if the employee does not profit from his disloyalty. *See*, *e.g.*, *Sanders*, 2007 U.S. Dist. LEXIS 48126, at *10-11. Accordingly, this Court should apply the faithless servant doctrine to Kozlowski, and enter judgment in favor of Tyco on Kozlowski's claim under the ERA.

[5] Kozlowski's remaining cases also help Tyco. *See, e.g., Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 200 (2d Cir. 2003) (discussed above); *Turner v. Konwenhoven*, 100 N.Y. 115, 120 (1885) (holding that "[f]lagrant acts of dishonesty or crime which seriously affect the master's interest, continued during the service, might well be regarded as a bar to the recovery of wages, although the amount received and fraudulently appropriated might be far less than the amount fixed by the [service] contract," and noting that "embezzlement or criminal appropriation of the moneys of the defendant" could provide the basis for such a bar). And, while Kozlowski describes the faithless servant as "obscure," *see* Def. Mem. at 2, he cites to faithless servant cases dating back to 1885 and decided as recently as 2008. *Id*. at 27 (citing *Turner*, 100 N.Y. 115 at 120); *id*. at 28 (citing *Seven Hanover Assocs., LLC v. Jones Lang Lasalle Americas, Inc.*, 2008 WL 464337, at *5 (S.D.N.Y. Feb. 19, 2008)).

C. Under Bermuda and English Law, Kozlowski is Not Entitled to Retirement Benefits, or Any Other Compensation.

The legal principles applicable under both Bermuda law and English law regarding the consequences of a breach of fiduciary duty are long standing and well established. Bell Aff. ¶ 17. A fiduciary who has committed a dishonest breach of fiduciary duty forfeits the right to any remuneration from his principal. *Id*. at ¶18. In equity, if a principal has already paid compensation to the fiduciary, then the payment is recoverable by an accounting. *Id*. at ¶ 19.

In *Kelly v. Cooper*, [1992] 3 WLR 936, the Judicial Committee of the Privy Council – the highest court in the Bermudian justice system, Bell Aff. ¶ 4 – considered whether the defendants, although not guilty of bad faith, had acted in breach of their fiduciary duties and were therefore not entitled to be paid their commission. The Court held that "[a]s to the defendants' claim for commission, even if a breach of fiduciary duty by the defendants had been proved, they would not thereby have lost their right to commission unless they had acted dishonestly." *Cooper*, [1992] 3WLR 936; Bell Aff. ¶ 24. Accordingly, under Bermuda law, fiduciaries lose their right to compensation if the breach of fiduciary duty is dishonest, and certainly, if fraudulent.

Likewise, English courts long have ruled that disloyal agents can forfeit their entitlement to remuneration. In *Rhodes v. Macalister*, [1923] 29 Com Cas 19, the Court of Appeal of England and Wales ruled that an agent who had obtained a secret profit was not entitled to his commission. That is, an agent who takes a secret profit "acts so adversely to his employer that he forfeits all remuneration from the employer." *Id*. (attached hereto as Exhibit A); *see also Andrews v. Ramsay and Co.*, [1903] 2 KB 635 (attached hereto as Exhibit A) ("A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission."); Bell Aff. ¶¶ 20-21.

Recently, the English Court of Appeal applied this line of authority to conclude that where there is a breach of fiduciary duty, the "commission is forfeit." *Imageview*, [2009] EXCA Civ 63, at ¶ 51; *see also Murad and another v. Al Saraj and another*, [2005] EWCA Civ 959 (explaining that policy reasons exist for imposing stringent liability on fiduciaries); Bell Aff. ¶ 20. The English court held: "[W]here the agent's remuneration is to be paid for the performance of several inseparable duties, if the agent is unfaithful in the performance of any one of those duties by reason of his receiving a secret profit in connection with it − and I here use that word 'unfaithful' as including a breach of obligation without moral turpitude − it may be that he will forfeit his remuneration, just as in certain cases a captain of a ship might be held . . . to forfeit his wages as a result of misconduct in any branch of his duty as captain." *Imageview*, [2009] EXCA Civ 63, at ¶ 35 (quoting *Hippisley v. Knee Brothers*, [1905] 1 KB 1, 9); *see also* Bell Aff. ¶ 22.

The English Court of Appeal took the further step of answering Kozlowski's argument − if the principal received the benefit of the contract, why should he not have to pay for it? *Imageview*, [2009] EXCA Civ 63, at ¶ 47. Putting aside that Tyco certainly did not receive what it bargained for − it received a faithless servant when it thought it was getting a faithful servant − English cases, like New York's decisions, make no concession to a faithless servant simply because his master has made money from the relationship. *Id.* at ¶ 49 (a disloyal agent "forfeit[s] any right to remuneration at all" and the "result may actually be that the employer makes money out of the fact that the agent has taken commission").

Kozlowski, at the "helm" as he put it, committed breaches far worse than receiving a secret profit and his breaches indeed involved moral turpitude. Plainly, the 2009 English Court of Appeal would hold Kozlowski accountable and would rule that Kozlowski has "destroy[ed] the entitlement" to compensation paid during periods of disloyalty. *See Imageview*, [2009] EXCA Civ 63, at ¶ 37; *see also* Bell Aff. ¶ 23 ("Even if it could be said that Mr. Kozlowski earned his retirement benefit under the ERA by virtue of services other than his services he performed fraudulently and dishonestly, he would still, as a result of this principle, be disentitled to all remuneration whether fairly earned or otherwise.") (emphasis in original).

The policy reasons supporting such a result boil down to one – providing a deterrent. The Court of Appeal explained:

> We are here concerned not with merely damages such as those for a tort or breach of contract but with what the remedy should be when the agent has betrayed the trust reposed in him – notions of equity and conscience are brought into play. Necessarily such a betrayal may not come to light. If all the agent has to pay if and when he is found out are damages the temptation to betray the trust reposed in him is all the greater. So the strict rule is there as a real deterrent to betrayal.

Imageview, [2009] EXCA Civ 63, at ¶ 50. The *Imageview* court concluded that "[t]he more that principle is enforced, the better for the honesty of commercial transactions." *Id.* Tyco agrees.

Kozlowski's expert has declared that no equivalent to the faithless servant doctrine exists in Bermuda. *See* Declaration of Saul M. Froomkin, 10/7/2008 (the "First Froomkin Decl."), ¶ 5; Def. Mem. at 25-26. However, the authority Mr. Froomkin relies on does not address the equitable principles at issue in *Cooper* and *Imageview*, and at issue here. Bell Aff. ¶ 26. One of Mr. Froomkin's authorities, *Target Holdings Ltd. v. Redfern*, [1996] AC 421, addresses an entirely different equitable remedy. *See* Bell Aff. ¶ 27. It does not concern the liability of a fiduciary to account for his own profit or other principles applicable to a dishonest fiduciary. *Id.*

In *Fassihi & Ors v. Item Software (UK) Ltd.*, [2004] EWCA Civ. 1244, also relied on by Mr. Froomkin, the question whether the fiduciary was entitled to his salary despite his breaches of duty was not appealed, and the court explicitly stated it "express[ed] no view thereon." *Id.* at ¶ 20; *see also* Bell Aff. ¶ 29. Moreover, because *Fassihi* concerned the statutory construction of

English legislation and common law remedies, not equitable remedies for breach of fiduciary duty and the scope of liability to account, it does not address in any way the equitable principles relevant to Kozlowski's breaches. *Id.*

Kozlowski's Bermuda expert failed to consider binding authority when he attested that the faithless servant doctrine "has no equivalent under the law of Bermuda" or under "the British common law, to which Bermuda courts look for guidance in the absence of specific Bermuda authority." First Froomkin Decl., ¶ 5; Def. Mem. at 25-26. Contrary to Mr. Froomkin's attestations, beginning at least by the late 1800s in England, as in New York, a similar doctrine has existed to deter the disloyalty of fiduciaries. *See Imageview*, [2009] EXCA Civ 63 at ¶¶ 49-50. And, that doctrine's remedy is to disentitle a disloyal fiduciary from any compensation paid or expected to be paid for the period of disloyalty, even if the relationship resulted in an overall benefit to the principal. Bermuda courts, too, have acknowledged that a dishonest fiduciary may be barred from recovering any compensation. *See Cooper*, [1992] 3 WLR 936; *see also* Bell Aff. ¶ 25 (while the threshold to be reached before a fiduciary is disentitled to all remuneration is higher under Bermuda than U.S. law, "it is quite plain that the dishonest conduct of Mr. Kozlowski reaches that threshold and, as a matter of Bermuda law . . . Mr. Kozlowski has forfeited his rights to remuneration from the Company for services whether under his employment agreements, ERA, or any other agreement"). Mr. Froomkin's declarations are obviously incomplete, utterly unconvincing, and fail to accurately reflect Bermuda law with respect to dishonest breaches of fiduciary duty. Kozlowski cannot avoid the consequences of his breaches by looking to Bermuda or English law.

II. Kozlowski Fraudulently Induced Tyco to Enter Into The ERA.

In his motion for summary judgment, Kozlowski seeks to limit consideration of the ERA to the "four-corners" of the agreement, arguing that Tyco breached the terms of an otherwise unambiguous contract. Def. Mem at 1-2, 6-11, 18-22. While the terms of the ERA may be straightforward, Kozlowski himself was anything but. It is well-established that Kozlowski began defrauding Tyco at least by 1995. Tyco SUF ¶¶ 2, 94. By the time Tyco entered into the ERA in 1999, Kozlowski's thefts were ongoing, pervasive, and well-hidden. Tyco SUF ¶¶ 44-50, 101, 108, 117-118; *People v. Kozlowski*, 846 N.Y.S.2d 44 (N.Y. App. Div. 2007) (affirming convictions), *aff'd* 898 N.E.2d 891 (N.Y. 2008), *cert. denied* 129 S. Ct. 2774 (2009). Unaware of Kozlowski's criminal and disloyal conduct, Tyco endeavored through the ERA to secure Kozlowski's "continued services and loyalty" as an executive. Kozlowski Ex. 1.[6] No system of law that arguably applies here – whether Bermuda, New York, or even English common law – recognizes the legitimacy of a fraudulently induced contract. Because of Kozlowski's dishonest and fraudulent conduct and misrepresentations of fact inducing Tyco's agreement to the terms of the ERA, the agreement is subject to rescission and Tyco's promise to pay Kozlowski is extinguished. Accordingly, Kozlowski's motion for summary judgment on his breach of contract claim should be denied.

A. Under New York Law, the ERA is Subject to Rescission Because it was Induced by Kozlowski's Fraud.

Under New York law, it is well-established that fraud in the inducement may provide a defense to a breach of contract claim. *Clarke v. Max Advisors*, 235 F. Supp. 2d 130, 142 (N.D.N.Y. 2002); *see also JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*,

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[6] References herein to "Kozlowski Ex. __" refer to exhibits attached to Kozlowski's Selden Declaration filed in support of Kozlowski's Motion for Partial Summary Judgment.

189 F. Supp. 2d 24, 26 (S.D.N.Y. 2002) ("Fraudulent inducement and fraudulent concealment are familiar defenses to contractual performance."). Here, it is beyond question that Kozlowski fraudulently induced the ERA. The undisputed evidence establishes each element of fraudulent inducement: that Kozlowski (i) made a false representation of a present, material fact; (ii) knew the representation to be false; (iii) made the false representation to Tyco; (iv) intended Tyco to act on the false representation; and (v) caused Tyco, in ignorance of its falsity, to justifiably rely on the misrepresentation to its own injury.[7] *Clarke*, 235 F. Supp. 2d at 142.

1. Kozlowski Made Knowingly False Representations of Fact to Tyco.

Beginning no later than January 1, 1995, and continuing until his forced resignation in 2002, Kozlowski engaged in a scheme to obtain property from Tyco by fraudulent means and, in furtherance of this scheme, committed multiple felonies against Tyco for which he was convicted and remains imprisoned. Tyco SUF ¶¶ 19-20, 35, 43-50, 88-92. Kozlowski lied, stole, and concealed his criminal activities for years, all the while artfully crafting and carefully maintaining the façade of a loyal CEO. Tyco SUF ¶¶ 2, 64, 94, 108, 117-118. The resulting 22 criminal convictions of grand larceny, falsification of business records, conspiracy, and securities fraud conclusively establish that, during this period, Kozlowski continued his larcenous scheme unabated and unbeknownst to Tyco. *SEC v. McCaskey*, 2001 WL 1029053, at *3 (S.D.N.Y.

[7] Fraudulent inducement under the English common law is substantially similar to New York law. *See Edgington v Fitzmaurice* [1881-85] All ER Rep 856, 861 (attached hereto as Exhibit A); *see also Attwood v. Small*, [1838] 6 Cl. & F. 232 (also reported at [1835-42] All ER Rep 258) (attached hereto as Exhibit A) ("I say, if the parties are induced fraudulently in any way, although they may have other reasons for entering into the contract, if the strong grounds which prevailed on them to enter into the contract were fraudulent representations, that will give an action in a court of law for deceit, and . . . would be considered as a sufficient ground in a court of equity to set aside the contract."); *Yeoman's Row Management Ltd and another v. Cobbe* [2008] All ER (D) 419 (Jul) (attached hereto as Exhibit A) (House of Lords confirming the position that rescission of the contract is a well-established remedy for fraudulent misrepresentation).

Sept. 6, 2001) (a criminal defendant is estopped from denying in a subsequent civil action all facts material and underlying to his criminal conviction). Kozlowski cannot dispute that he breached his fiduciary duties to and defrauded Tyco beginning in 1995 and continuing until 2002. Tyco SUF ¶¶ 2-6, 34; *People v. Kozlowski*, 846 N.Y.S.2d 44 (N.Y. App. Div. 2007), *aff'd* 898 N.E.2d 891 (N.Y. 2008), *cert. denied* 129 S. Ct. 2774 (2009).

a. Kozlowski made affirmative false representations of present, material fact when he signed the ERA.

Tyco and Kozlowski entered into the ERA on March 1, 1999. The ERA includes a number of introductory clauses affirming (1) Kozlowski's role at Tyco ("the Executive is employed by Tyco in a senior executive capacity"); (2) Tyco's motivation for entering into the ERA ("the assurance of the continued services and loyalty of the Executive is essential to the future best interests of Tyco"); and (3) the consideration for Kozlowski's continued service as an executive ("the Executive is willing to continue in the service of Tyco if Tyco will agree to pay him or his beneficiary certain amounts"). Kozlowski Ex. 1. While Kozlowski asserts that "whereas" clauses typically are not treated as substantive provisions of an executed contract, *see* Declaration of Saul M. Froomkin, March 3, 2010 ("Second Froomkin Decl.") at ¶ 5.A.viii, such statements may serve as evidence of the parties' intention at the time the agreement was made. *United States v. Hamdi*, 432 F.3d 115, 123 (2d Cir. 2005) ("contracts may, and frequently do, include recitals of the purposes and motives of the contracting parties, which may shed light on, but are distinct from, the contract's operative promises to perform"); *Jim Bouton Corp. v. Wm. Wrigley Jr. Co.*, 902 F.2d 1074, 1077 (2d Cir. 1990) ("Although the 'Whereas' clauses of a contract do not determine its operative effect, they do furnish a background in relation to which the meaning and intent of the operative provisions can be determined.").

The first element of a claim for fraudulent inducement requires a plaintiff to establish that the defendant made a false statement of present fact. As noted above, included in the ERA's recitals is the following clause: "WHEREAS, the assurance of *the continued services and loyalty of the Executive* is essential to the future best interest of Tyco." Kozlowski Ex. 1 (emphasis added). By signing the ERA with this statement of intention, Kozlowski made two knowingly false representations of material fact: (i) that he had been loyal to Tyco prior to March 1, 1999; and (ii) that he intended to be loyal to Tyco following the execution of the ERA.

Kozlowski's first misrepresentation of material fact – that he had been loyal to Tyco prior to the signing of the agreement – qualifies as a "statement of present fact" because, by signing the ERA on March 1, 1999, Kozlowski affirmatively stated that as of that moment he was currently and had been in the past a loyal Tyco executive. *Id*. Moreover, this statement of present fact is "material" because Tyco would not have entered into the ERA if it had known that its CEO and Chairman of the Board had been engaged in a criminal scheme to defraud the company. *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 170 (2d Cir. 1999) ("A misrepresentation is material to a fraud claim only if it is the type of misrepresentation likely to be deemed significant to a reasonable person considering whether to enter into the transaction."); *see also Greenberg v. Chrust*, 282 F. Supp. 2d 112, 119 (S.D.N.Y. 2003) (a representation is *immaterial* where it is "so obviously unimportant . . . that reasonable minds could not differ on the question of [its] importance") (internal quotation marks and citation omitted); *Silivanch v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241, 273 (S.D.N.Y. 2001) ("a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it is addressed"). Thus, because Kozlowski is estopped from denying that his criminal and disloyal conduct began at least by 1995 and continued until 2002, *see McCaskey*, 2001 WL 1029053, at *3, Kozlowski's representation that he had been loyal to Tyco prior to March 1, 1999, was a *patently false representation of a present, material fact.*

The second misrepresentation – that Kozlowski would be loyal to Tyco after executing the agreement – also qualifies as a "statement of present fact" for purposes of fraudulent inducement. While mere promissory statements as to what will be done in the future are not actionable, "if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of material existing fact upon which an action for rescission based on fraudulent inducement may be predicated." *Stewart v. Jackson & Nash*, 976 F.2d 86, 89 (2d Cir. 1992) (emphasis omitted) (quoting *Sabo v. Delman*, 143 N.E.2d 906, 908 (N.Y. 1957)). Here, because Kozlowski was convicted of defrauding Tyco from at least January 1995 up and until June of 2002 – facts that he is collaterally estopped from denying – Kozlowski's affirmative representation in the ERA that he would be loyal to Tyco in the future is transformed into a "statement of present fact" because, as established by his convictions, Kozlowski had an undisclosed present intention of continuing his disloyal conduct when he signed the ERA on March 1, 1999. *See Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 502 N.E.2d 1003, 1004 (N.Y. 1986) (stating that a statement of present fact exists where defendant made a promise with the undisclosed present intention of not performing it).

These crimes conclusively prove that Kozlowski had no honest intention of foregoing his criminal scheming and thereafter becoming loyal to Tyco merely by operation of executing the ERA.[8] If Tyco had been aware at the time the ERA was executed that Kozlowski had no honest intention of loyally serving as a fiduciary, Tyco would not have sought to retain his services in the future. *See* Tyco SUF ¶¶ 6. Thus, Kozlowski's representation in the ERA that he would be

[8] In fact, Kozlowski's crimes against Tyco only intensified in severity after he had secured Tyco's agreement to the ERA and its attendant tax benefits. Tyco SUF ¶¶ 44-50.

loyal to Tyco in the future was a second*, patently false representation of a present, material fact* for purposes of the defense of fraudulent inducement.

There is no question that Kozlowski himself was aware that these representations of present, material fact were false given that he was himself the perpetrator of the multiple crimes against Tyco. Tyco SUF ¶¶ 12, 18-19, 35, 43-50. Additionally, there is no dispute that these false representations of fact were made to Tyco, as they were memorialized in the agreement between Kozlowski and Tyco. Kozlowski Ex. 1.

b. Each disloyal act that Kozlowski failed to disclose to Tyco prior to March 1, 1999 constitutes its own false representation of fact.

In addition to Kozlowski's affirmative false representations of fact memorialized in the recitals of the ERA, Kozlowski made innumerable false representations of fact in the form of omissions that induced Tyco to enter into the ERA and, therefore, independently give rise to the defense of fraud in the inducement.

A false representation of fact need not be an affirmative statement. Restatement (Second) of Contracts § 161 (1981); *United States v. Heatley*, 39 F. Supp. 2d 287, 310-11 (S.D.N.Y. 1998) ("the failure to disclose a fact may constitute a misrepresentation where disclosure is necessary to prevent a prior statement from being a misrepresentation."). Rather, Kozlowski's non-disclosure of a material fact constitutes a misrepresentation by omission for purposes of the defense of fraudulent inducement. Restatement (Second) of Contracts § 161 (1981) (The non-disclosure of a fact may be the "equivalent to an assertion that the fact does not exist"); *Great Earth Cos. v. Simons*, 2000 U.S. Dist. LEXIS 3772, at *10 (S.D.N.Y. Mar. 24, 2000) ("plaintiff alleging fraudulent inducement must prove . . . a material misrepresentation or *omission of fact*") (emphasis added). While a party need not disclose "all he knows to the other party" when negotiating a contract, where a special relationship exists between the contracting parties, such as a fiduciary or beneficiary relationship, there is a duty to disclose material facts. Restatement (Second) of Contracts §§ 161, 173 (1981); *Banque Franco-Hellenic de Commerce Int'l Et Maritime, S.A. v. Bekas*, 1995 U.S. Dist. LEXIS 17179, at *8 (S.D.N.Y. 1995) ("The duty to disclose arises 'where parties enjoy a fiduciary relationship' or where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge.") (quoting *In re Gas Reclamation*, 741 F. Supp. 1094, 1104 (S.D.N.Y. 1990)).

Here, there is no dispute that Kozlowski owed a fiduciary duty to Tyco, thus creating a duty to disclose all facts relevant to Tyco's understanding of the ERA. Restatement (Second) of Contracts § 173 (1981) (where a fiduciary entered into a contract with a beneficiary, the beneficiary must enter into the contract with a "full understanding of [its] rights *and of all relevant facts that the fiduciary knows or should know*") (emphasis added). Accordingly, Kozlowski's intentional failures to disclose his fraudulent and criminal conduct occurring between January 1, 1995, and the execution of the ERA constitute false representations of material fact by omission for purposes of a fraudulent inducement analysis, and the ERA is subject to rescission by Tyco.

2. Kozlowski Intended That Tyco Rely, and Caused Tyco to Justifiably Act, Upon His False Representations of Fact in Entering Into the ERA.

The evidence is also undisputed that Kozlowski intended for Tyco to rely and, ultimately, act upon these various representations of fact. Kozlowski induced Tyco to rely on his representation that he was a loyal executive, as evidenced by the recital in the ERA that states "the assurance of the continued services and loyalty of the Executive is *essential to the future best interests of Tyco*." Kozlowski Ex. 1 (emphasis added). This recital shows that Tyco was made to believe that Kozlowski had been in the past and intended to be in the future a loyal fiduciary, that his services were such that Tyco would wish to secure them indefinitely, and that Kozlowski as an executive was "essential" to Tyco. *Id.* Unaware of Kozlowski's disloyal misconduct, Tyco reasonably and justifiably relied upon Kozlowski's representations – having no indication at the time of Kozlowski's criminal activities – and agreed to the ERA. *Id.* In fact, without Kozlowski's representations that he had been and would continue to be a loyal executive, the very foundation of the ERA for Tyco – to secure the "continued" services and loyalty of Kozlowski – collapses. *Id.*

Had Tyco been aware of Kozlowski's ongoing criminal activity prior to March 1999, any interest in securing Kozlowski's supposed "essential" services and loyalty would necessarily have evaporated, and Kozlowski would never have secured the benefits of the ERA, nor the luxury of continued employment for another 3 years. *See* Tyco SUF ¶¶ 6. Furthermore, Tyco's injury as a result of Kozlowski's gross failure to disclose his fraudulent, disloyal, and criminal conduct is established conclusively by his convictions for defrauding Tyco. Tyco SUF ¶¶ 20-21, 110, 160-62; *People v. Kozlowski*, 846 N.Y.S.2d at 48. Thus, the final two elements of the defense of fraudulent inducement under New York law – namely, that Kozlowski intended that Tyco rely on his false representations of fact, and that Tyco justifiably relied and acted upon said misrepresentations to its own injury – are beyond dispute. For these reasons, upon application of New York law, the ERA is subject to rescission on the basis of fraud in the inducement, and summary judgment for Kozlowski should be denied.[9]

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[9] Kozlowski's claim for recovery under the ERA is also precluded by the defense of fraudulent concealment. Under New York law, the elements of fraudulent concealment are identical to those of fraudulent inducement with the added requirement that a duty to disclose material information be established. *Lumbermens Mut. Cas. Ins. Co. v. Darel Group U.S.A.*, 253 F. Supp. 2d 578, 583 (S.D.N.Y. 2003) ("To establish fraudulent concealment, a plaintiff must also prove that the defendant had a duty to disclose the material information.") (quoting *Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank*, 57 F.3d 146, 153 (2d Cir. 1995)). Because

B. Under Bermuda Law, the ERA is Subject to Rescission Based on Kozlowski's Fraud and Dishonesty.

Like New York law, under Bermuda law, a party can unilaterally rescind a contract that was induced by fraud or dishonesty. Bell Aff. ¶¶ 31, 34-36. It is well-established under Bermuda law that the equitable defense of rescission is available where an agreement was induced by a wrongful representation, duress, or was otherwise wrongfully procured. Bell Aff. ¶¶ 32, 34-37, 39. Under such circumstances, a Bermuda court will apply the fundamental principles of equity to require that the agreement be set aside and the parties be restored to the position they would have been in had the agreement never been executed. Bell Aff. ¶ 31. Rescission is only available where, as here, both sides of the agreement may be undone. Bell Aff. ¶ 33 (citing *Guinness plc v. Saunders and another* [1990] 1 All ER 652 at page 665, paragraph 7-126 *Snell's Equity*).

Tyco's rescission of the ERA is the only possible result under Bermudian equitable principles. Here, Kozlowski knew in March 1999 when he signed the ERA that he was not providing the honest, loyal services expected of a Tyco executive, but, instead, was defrauding Tyco through dishonest – as opposed to innocent – breaches of fiduciary duty. Bell Aff. ¶ 35; Tyco SUF ¶¶ 12, 18-19, 35, 43-50. Kozlowski's criminal convictions for stealing from, falsifying the records of, conspiring against, and defrauding Tyco collaterally estop him from denying that, at least by 1995 and continuing until 2002, he was engaged in a criminal scheme to defraud Tyco, and did so defraud, through calculated deception and dishonesty. *See Aramony v. United Way of Am.*, 28 F. Supp. 2d 147, 171 (S.D.N.Y. 1998); *People v. Kozlowski*, 846 N.Y.S.2d 44, 46-47 (N.Y. App. Div. 2007), *aff'd* 898 N.E.2d 891 (N.Y. 2008), *cert. denied* 129

Kozlowski owed a fiduciary duty to Tyco, *see* Tyco SUF ¶ 34, the defense of fraudulent concealment is concurrently established.

S. Ct. 2775 (2009). Additionally, and as discussed *supra*, Part II.A, Kozlowski made innumerable misrepresentations of fact by omission through his failures to disclose material facts and information as a fiduciary.

Furthermore, Kozlowski's convictions and misrepresentations rise to the level of "dishonesty" required under Bermuda law to rescind a transaction. Under Bermuda law, "the test applied for determining dishonesty . . . [requires] that a defendant's knowledge of a transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct." *See* Bell Aff. ¶ 35 (citing *Barlow Clowes International Ltd (in liquidation) v. Eurotrust International Ltd and others* [2005] UKPC 37, at para 15). No doubt that a Bermuda court would view the conduct giving rise to 22 criminal convictions for grand larceny, falsification of business records, conspiracy, and securities fraud for which the dishonest fiduciary is currently serving 8 1/3 – 25 years in a New York state prison as falling outside "normally acceptable standards of honest conduct." *Id.* Moreover, Kozlowski's false representations of fact, whether express or implied, would each, standing alone, lead a Bermuda court to the equitable conclusion that Kozlowski forfeited any right to recovery of additional compensation under the ERA. Bell Aff. ¶¶ 35-39. Accordingly, the ERA is subject to rescission on the grounds of dishonesty and fraud.

In sum, Tyco simply would not have entered into the ERA but for Kozlowski's knowingly false representations of material fact. Kozlowski thus fraudulently induced Tyco to enter into the ERA. Whether applying the law of New York or Bermuda, the result is the same: the ERA is subject to rescission by Tyco, and Kozlowski is not entitled to summary judgment on his counterclaim under the ERA.

III. Kozlowski Is Not Now, Nor Will He Ever Be, Entitled To Indemnification In Connection With The TyCom Securities Fraud Case, Or Otherwise.

Tyco's Bye-Laws incorporate Section 98 of the Bermuda Companies Act, 1981 (the "Companies Act"), which precludes a company from indemnifying an officer who commits "fraud or dishonesty . . . in relation to" Tyco. Kozlowski's larcenous and fraudulent acts against Tyco, which are established and uncontroverted, extinguish his right to indemnification. The suggestion that a company should be compelled to indemnify an officer who is in prison for defrauding and stealing from that company is untenable.

As to the TyCom litigation itself, what Kozlowski casually refers to as a "garden variety securities class action," was then and still is a billion dollar securities fraud class action lawsuit, which includes a claim under Section 10(b) of the Securities Exchange Act of 1934 alleging that Kozlowski "employed devices, schemes and artifices to defraud . . . and [engaged in] a course of fraudulent conduct . . . in an effort to assure investors of TyCom's unimpeded progress and expansion." TyCom Complaint ¶ 298 (Tyco Ex. J).[10] The TyCom Plaintiffs further allege that Kozlowski had the motive and opportunity to commit securities fraud "by virtue of [his] . . . unauthorized bonuses" *Id*. at ¶ 303 – specifically, the TyCom IPO Bonus, which formed the basis of two felony convictions. Tyco SUF ¶ 46, 61-69. At minimum, Kozlowski is not entitled to indemnification in light of these allegations.

A. Tyco's Bye-Laws Preclude Indemnification To Officers Who Defraud Or Otherwise Commit Dishonest Acts In Relation to Tyco.

As discussed in Tyco's Motion for Summary Judgment, beginning by at least 1995, Kozlowski systematically looted and defrauded Tyco, stealing, among other things, tens of

[10] References to "Tyco Exhibit __" relate to exhibits attached to the Declaration of Elizabeth F. Edwards in Support of Plaintiffs' Brief in Opposition to Defendant/Counterclaim Plaintiff's Motion for Partial Summary Judgment, April 16, 2010.

millions of dollars in unauthorized bonuses. Tyco Br. at 2. The jury's findings in Kozlowski's criminal trial are conclusively established. *Id.* As a matter of law, Kozlowski cannot deny that he acted dishonestly and defrauded Tyco for nearly eight years.

Under the Companies Act, an officer is not entitled to indemnification if he commits "fraud or dishonesty . . . in relation to the company." The Companies Act does not require that the "fraud or dishonesty" be committed in the context of the case for which indemnification is sought. It does not require that "[e]ach claim for indemnification . . . be considered independently." Def. Mem. at 32. For this latter proposition, Kozlowski relies on the Second Froomkin Declaration. But that Declaration is completely silent on this issue.

Furthermore, there is no Bermuda authority holding that an officer convicted of dishonest and fraudulent conduct would be permitted to recover under a bye-law indemnity. *See* Bell Aff. ¶ 41. To the contrary, for the same reasons that Kozlowski is not entitled to payment under the ERA, *see supra* Parts I and II, and that Tyco is entitled to disgorge all of Kozlowski's compensation back to 1995, *see* Tyco's Motion for Partial Summary Judgment, Tyco has no obligation to indemnify Kozlowski for *anything*. Applying the established principles of equity discussed above, under Bermuda law, "a dishonest director would not be entitled to claim a right of recovery under a bye-law indemnity for the same reason that a dishonest director must disgorge profits, give an accounting, repay any remuneration, and forfeits any contractual entitlement to commission or fees." Bell Aff. ¶ 41. Indeed, Kozlowski's request for specific performance of his alleged right to indemnification is itself a request for equitable relief. Under Bermuda law, equitable relief is not available to those who come to the Court without "clean hands." Bell Aff. ¶ 42. Kozlowski's hands are indisputably unclean.

B. The Allegations Against Kozlowski In The TyCom Securities Fraud Case Preclude Indemnification Under Tyco's Bye-Laws.

Because there is no dispute that Kozlowski committed acts of fraud and dishonesty against Tyco, Kozlowski seeks to limit this Court's focus to the allegations against him in the TyCom litigation. Kozlowski argues that, to the extent he is accused of fraud in the TyCom case, he is still entitled to indemnification because the Companies Act only denies indemnification to an officer who commits fraud or dishonest acts "against" the company, and no such allegations remain against him in the TyCom case. The problem with this argument is three-fold. First, as discussed *supra* Part III.A., Bermuda law precludes Tyco from indemnifying Kozlowski in any matter due to his rampant acts of fraud and dishonesty committed in relation to Tyco. Second, Tyco's Bye-Laws do not limit the prohibition on indemnification to acts of fraud or dishonesty committed "against" Tyco. The Bye-Laws simply do not say that. Third, even if Kozlowski's reading of the Bye-Laws were correct, his argument fails because some of the fraud allegations against Kozlowski in the TyCom case arise exclusively out of the fraud and larceny he committed against Tyco.

1. The Companies Act Denies Indemnification For Acts of Fraud And Dishonesty "In Relation To" – Not Simply Against – Tyco.

Under Tyco's Bye-Laws, an officer is not entitled to indemnification for "any matter which would render it void pursuant to the Companies Acts." Under Section 98 of the Companies Act, a bye-law that permits indemnification of an officer who commits "fraud or dishonesty . . . in relation to the company shall be void." Kozlowski boldly asserts that the language "in relation to the company" must mean "against" the Company. Def. Mem. at 31. In support of this nonsensical reading of the Bye-Laws, Kozlowski cites the Second Froomkin Declaration, at paragraph 5(D). However, Froomkin says the *opposite*:

> In my opinion, under Bermuda law, the effect of the said bye-law as read with section 98 accordingly results in a contractual obligation upon the company to indemnify Mr. Kozlowski against all claims made against him in relation to the company, *save for those arising from his own fraud and dishonesty*.

Second Froomkin Decl., ¶ 5(D)(v) (emphasis added).

Moreover, the suggestion that "in relation to" means "against" is preposterous. "In relation to" means "with reference to; concerning." Dictionary.Com, http://dictionary.reference.com/browse/in+relation+to (last visited April 13, 2010). "Against" means "in opposition to; contrary to; adverse or hostile to." Dictionary.Com, http://dictionary.reference.com/browse/against (last visited April 13, 2010). This is not a close call. There is no reasonable way to read "in relation to" as "against." *See* Bell Aff. ¶¶ 45-46. Kozlowski's argument does not have a shred of merit.

Again citing the Second Froomkin Declaration, Kozlowski also argues that "in relation to the Company" should be read to exclude "statements made on the company's behalf for which the company is alleged to be equally liable." Def. Mem. at 32. Again, neither the Second Froomkin Declaration nor the Bye-Laws say this or anything like it. *See* Bell Aff. ¶ 48 ("The fact that the Company may also, by virtue of the actions of Mr Kozlowski, be exposed to liability does not assist Mr Kozlowski"). This argument also lacks merit.

2. Kozlowski's Larceny Against Tyco Is an Issue In The TyCom Plaintiffs' Fraud Case Against Kozlowski.

Even if one could read "in relation to" as meaning "against," Kozlowski would still not be entitled to indemnification in the TyCom case. Kozlowski argues that the alleged misstatements and omissions at issue in the TyCom case "relate to the expected demand for bandwidth on TyCom's undersea network . . . [and] not to any individual action or statement by Mr. Kozlowski." Def. Mem. at 30. This is an incredible statement. Though it is true that the

MDL Court dismissed the looting claims brought by TyCom's shareholders because they could not prove loss causation, *see Stumpf v. Garvey*, 2006 WL 39237, at *1 (D.N.H. Jan. 6, 2006), the TyCom Plaintiffs continue to assert that Kozlowski's larceny and fraud against Tyco was a primary motivation for the IPO.

In the Consolidated Securities Class Action Complaint, the TyCom Plaintiffs allege that Kozlowski's primary motivation for the TyCom IPO was to use it as an opportunity to generate a pool of fresh money to use to discharge tens of millions of dollars in unauthorized loans. TyCom Complaint (Tyco Ex. J) ¶¶ 3, 10, 12, 16(e). Further, they allege that if Kozlowski's motivation had been disclosed, it would have cast material doubt among investors as to the fabricated motivation for the IPO, i.e., to meet the increasing demand for bandwidth. *Id.* at ¶ 141. According to the TyCom Plaintiffs, by virtue of his unauthorized bonuses, Kozlowski had a "motive and opportunity to commit fraud" and did in fact commit fraud. *Id.* at ¶¶ 298, 303. Finally, Kozlowski's scheme was not revealed until he was subjected to criminal proceedings for having looted Tyco. *Id.* at ¶ 15. None of these factual allegations were dismissed or otherwise impaired by any decision of the MDL Court.[11]

Kozlowski's larceny and fraud in connection with the TyCom IPO remains a live issue in that case, as the TyCom Plaintiffs' more recent filings demonstrate. Plaintiff's Memorandum of Law in Support of His Motion for Partial Summary Judgment, *Stumpf v. Garvey*, No. 03CV3540 (GEB) (DEA) (June 12, 2009) (Tyco Ex. L), at 15 ("A notable omission [from the Prospectus] was the failure to disclose how the IPO would enrich [Kozlowski]."). Indeed, the significance of

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[11] The public disclosure of Kozlowski's disloyal acts is also a critical element in the TyCom Plaintiffs' pending statute of limitations arguments. *See* TyCom Plaintiffs' Consolidated Memorandum in Opposition to Motions for Summary Judgment filed by Tyco International Ltd., TyCom Ltd. and the Underwriter Defendants, *Stumpf v. Garvey*, No. 03CV3540 (GEB) (DEA) (July 6, 2009), at 42-43.

Kozlowski's fraudulent conduct against Tyco to the TyCom Plaintiffs' case was crystallized in their opposition to the motion for summary judgment filed by Kozlowski in 2009:

> Kozlowski was motivated to make the Offering so that Tyco would realize a $200 million dividend, which he used in part to pay himself, Swartz and other executive officers unauthorized bonuses that, in turn, were used to repay their outstanding key employee and relocation loans and any income taxes associated therewith. In September 2000, shortly after the closing of the Offering, Kozlowski caused Tyco to pay "special" bonuses from the proceeds of the TyCom Offering that approximated $96 million, of which defendants Kozlowski and Swartz received approximately $33 and $17 million, respectively.
>
> Kozlowski was also motivated to use the TyCom IPO to inflate the trading price of Tyco's common stock, as he made substantial gains on insider sales. Because Tyco retained ownership of 86% of TyCom, the IPO inflated the price of Tyco's stock. Kozlowski's testimony confirmed that a higher valuation of Tyco's common stock, based on its price/earnings multiple, was among the justifications for the IPO . . . . During the Class Period, Kozlowski sold 7,540,947 shares of Tyco stock for gross proceeds of $431,469,990.66 at prices inflated by the TyCom IPO.
>
> Kozlowski's stock sales occurred within days of TyCom reaching its class period trading high of $45.4375 on September 1, 2000. . . . Thus, the success of the IPO was an integral part of Kozlowski's ability to sell his Tyco shares at inflated prices.

Plaintiff's Memorandum in Opposition to L. Dennis Kozlowski's Motion for Summary Judgment, *Stumpf v. Garvey*, 03CV3540 (GEB) (DEA) (July 17, 2009) (Tyco Ex. M), at 2-3.

Kozlowski tries to distance himself from these allegations by relying on Tyco's arguments that Kozlowski's looting was irrelevant to the question of Tyco and TyCom's liability to TyCom's former shareholders. Def. Mem. at 29-30. But Tyco's argument was never ruled upon and the allegations against Kozlowski concerning the interplay between his larceny and fraud and the TyCom IPO remain a live issue between Kozlowski and the TyCom Plaintiffs. In any event, Kozlowski's suggestion that he was sued simply because he signed the TyCom offering documents is completely unsupportable.

C. Kozlowski's Claim For Indemnification Has Not Yet Matured.

Notwithstanding the foregoing, to the extent Kozlowski could ever have a claim for indemnification in connection with the TyCom securities fraud case (and he cannot), that claim has not yet accrued. A company's indemnification obligations do not accrue until it is established that the officer has not committed any conduct that would preclude the company from paying an indemnity. *See* Bell Aff. ¶¶ 43-44; *cf. Homestore, Inc. v. Tafeen*, 888 A.2d 204, 212 (Del. 2005) (under Delaware law, the right to indemnification does not accrue until after the defense to legal proceedings has been successful). Kozlowski is a defendant in a securities fraud case and he is personally alleged to have committed fraud. Whether he did, in fact, commit fraud is an issue that the District of New Jersey has not yet resolved. Accordingly, Kozlowski's claim for indemnification in unripe and summary judgment must be denied.

Moreover, Kozlowski's Counterclaim and Motion for Summary Judgment seeks judgment on a claim for indemnification, not advancement of expenses. *Tafeen*, 888 A.2d at 212 ("Although the right to indemnification and advancement are correlative, they are separate and distinct legal actions."). The Companies Act recognizes the difference between indemnification, which is addressed in Section 98(1) and (2), and advancement, which is addressed in Section 98(2)(c). The latter section permits a company to include an advancement obligation in its bye-laws if it so chooses; however, Tyco's Bye-Laws do not contain such an obligation.

Accordingly, at minimum, Kozlowski has no right to an award of fees and expenses at this time because he has not asserted and cannot assert a claim for advancement. Because his indemnification claim has not yet matured, the Motion for Summary Judgment should be denied.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Tyco's Motion for Partial Summary Judgment, Kozlowski's Motion for Partial Summary Judgment should be denied.

Dated: New York, New York
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Respectfully submitted,

s/Marshall Beil____________

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2010, I electronically filed the foregoing *Plaintiffs' Brief in Opposition to Defendant/Counterclaim Plaintiff's Motion for Partial Summary Judgment* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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